United States Court of Appeals

for the Second Circuit

APPENDIX

74-2069

To be argued by
JAMES B. ZANE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-2069

LAWRENCE WALSH and LORETTA WALSH,
Plaintiffs-Appellants,

—*against*—

THE CITY OF LONG BEACH, ARTHUR ZIMMERMAN, DAVID LINDEN, AL SMITH and GEORGE TRIPANI,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

(Bruchhausen, *J.*)

APPENDIX

BRIEF FOR PLAINTIFFS-APPELLANTS

ZANE and ZANE
Attorneys for Plaintiffs-Appellants
Office and P.O. Address
One Rockefeller Plaza
New York 10020
(212) 245-2222

JAMES B. ZANE
MARTIN E. FIEL
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

TABLE OF CASES

CONSTITUTION OF THE UNITED STATES

STATUTES

RULES

OTHER MATERIAL

74-2069

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LAWRENCE WALSH and LORETTA WALSH,

Plaintiffs-Appellants,

-against-

THE CITY OF LONG BEACH, ARTHUR ZIMMERMAN, DAVID LINDEN, AL SMITH and GEORGE TRIPANI,

Defendants-Appellees.

On Appeal From The United States District Court
For the Eastern District of New York
(Bruchhausen, J.)

BRIEF FOR PLAINTIFFS-APPELLANTS

PRELIMINARY STATEMENT

Plaintiffs brought this action consisting of seven (7) causes of action based upon common law counts and 42 U.S.C. §§ 1982 and 1983. This appeal is taken from an order of the United States District Court for the Eastern District of New York, Bruchhausen, D.J., entered June 11, 1974, dismissing all seven causes of action notwithstanding the fact that neither the findings of law nor findings of fact addressed themselves to six of the causes of action.

THE DECISION BELOW

Judge Bruchhausen sitting in the Court below disposed of this case by dismissing plaintiffs' complaint in total disregard of both the Federal Rules of Civil Procedure and the General Rules for the Eastern District of New York. Although defendants' application consisted merely of a memorandum of law, the lower court treated that memorandum as a motion to dismiss purportedly under Rule 12(b)(5) of the Federal Rules of Civil Procedure. Moreover, defendants' application failed to contain a Notice of Motion, supporting affidavits or exhibits. In addition, defendants' application was untimely since an answer to the complaint was interposed. Fed.R.Civ.P. 12(b)(5). Notwithstanding the above, the entire complaint, consisting of seven separate causes of action, was dismissed based on the district court judge's conclusion that the complaint fails to state a claim pursuant to 42 U.S.C., § 1983. Judge Bruchhausen failed to discuss the remaining six causes of action brought pursuant to 42 U.S.C., § 1982, Article I, Section 10 and the Fourth, Fifth and Fourteenth Amendments to the Federal Constitution.* Plaintiffs have been denied their day in court on six causes of action because Judge Bruchhausen failed to find merit in a seventh.

---

* Judge Bruchhausen also disregarded that the case is based, inter alia, on diversity jurisdiction. Defendants have never challenged the diversity jurisdiction aspects of the Complaint.

THE FACTS

On April 25, 1952, the Building Commissioner of THE CITY OF LONG BEACH, acting on behalf of THE CITY OF LONG BEACH (hereinafter referred to as "THE CITY"), issued a Certificate of Occupancy, No. A-811 (App. Ex. 1) specifically approving use of the premises known as 425 West Olive Street, Long Beach, New York (hereinafter referred to as "the Premises"), as a three-family dwelling. The Premises had been built as a three-family dwelling in 1926 and were continuously and openly used as a three-family dwelling in compliance with the above mentioned Certificate of Occupancy from 1952 through 1970.

On April 15, 1969, plaintiffs LAWRENCE WALSH and LORETTA WALSH, in reliance on said Certificate of Occupancy not only purchased the Premises from Joseph Kotkin and Hanna Kotkin for use as a three-family dwelling but, in addition, duly executed, acknowledged and delivered their bond and mortgage to the Richmond Hill Savings Bank in the sum of THIRTY ONE THOUSAND and 00/100 ($31,000.00) DOLLARS. Plaintiffs used one of the three apartments on the Premises as their home; the remaining two apartments were rented by plaintiffs pursuant to lease agreements: one for TWO HUNDRED and 00/100 ($200.00) DOLLARS per month and the other for TWO HUNDRED THIRTY and 00/100 ($230.00) DOLLARS per month, respectively, to enable plaintiffs to repay the aforesaid mortgage.

On November 7, 1969, Eli Katz, then Building Commissioner of THE CITY, ignoring plaintiffs' properly issued Certificate of Occupancy, sent plaintiffs a letter alleging the Premises to be in violation of the zoning law (App. Ex. 2). The letter went on to threaten that should the violation not be remedied within ten (10) days, legal action would be instituted. This proved to be an empty threat. However, patently illegal action followed. On December 24, 1970, defendant, DAVID LINDEN (hereinafter referred to as "LINDEN"), formerly Commissioner of the Department of Buildings and Conservation of The City of Long Beach (hereinafter referred to as "the Department"), as agent for defendant, THE CITY, without any authority sent a letter to plaintiffs purporting summarily to revoke the aforesaid Certificate of Occupancy immediately on the grounds that the Premises were zoned for one-family use only (App. Ex. 3). Were it effective, such a revocation by mail at the instance of a single individual and without proper notice or any opportunity for plaintiffs to be heard would constitute not only a violation of § 302(5) of the Multiple Residence Law,* which grants noone the power to vacate the Certificate of Occupancy once it has been relied upon by a purchaser, but also a denial of plaintiffs' constitutional right not to be deprived of their property without due process of law.

---

* 35b McKinney's Consolidated Laws of New York.

Prior Treatment of the Premises

The discriminatory nature of defendants' unlawful treatment of plaintiffs becomes evident when viewed in the context of defendants' actions with regard to the previous owners of the premises. The fact that the premises were operated as a three-family dwelling in an area zoned for one-family residences, since 1927, had been on the record at the Office of the Building Commissioner since April 9, 1952 (App. Ex. 4). Nevertheless, the Corporation Counsel of THE CITY recommended, in 1952, that a Certificate of Occupancy for a three-family dwelling on the premises issue (App. Ex. 5), and such a Certificate of Occupancy did issue on April 25, 1952. Well aware of this situation, THE CITY took no lawful action to revoke said Certificate of Occupancy for a period of eighteen (18) years. There is on record only one occasion, some sixteen (16) years later, where an owner of the premises was informed that the premises were zoned for use as a one-family, rather than a three-family residence. At a meeting on June 13, 1968, LINDEN did apprise the then owner of the premises, Joseph Kotkin, that the premises were being operated in non-conformity with the zoning laws (App. Ex. 6), and asked him to remedy the situation. However, LINDEN never questioned the validity of the Certificate of Occupancy either with Kotkin or the Corporation Counsel at that time, nor attempted to revoke the Certificate of Occupancy.[1]

---

1 Deposition of David Linden, pp. 16, 17, the relevant portions of which are annexed herein as Exhibit "7" of the Appendix.

At the June 13, 1968 meeting, Kotkin assured LINDEN that he would comply with LINDEN's request. Nevertheless, there is no record of there having been any re-inspection of the premises while Kotkin was owner.[2] Furthermore, although Kotkin did not comply, but continued to maintain a three-family dwelling on the premises, LINDEN did not threaten to interfere, and in fact did not interfere in any way with Kotkin's conveyance of the premises as a three-family dwelling to plaintiff.

Plaintiffs' experience as owners of the premises have been to the contrary. Subsequent to plaintiffs' purchase of the premises, their establishment of a home thereon, and lease of two apartments, LINDEN, suddenly, in 1970 for the first time asserted that the Certificate of Occupancy, itself, was invalid, and made the unprecedented and unlawful attempt to revoke the Certificate as set forth hereinabove. As a result of this illegal endeavor to revoke the Certificate of Occupancy, plaintiffs were prevented from renewing the tenants' leases upon their expiration, and consequently the tenants vacated the premises thereafter. Plaintiffs have been unable to obtain other tenants by reason of defendants' act of unlawfully pretending to revoke the Certificate of Occupancy.

---

[2] Deposition of David Linden, p. 15.

Defendants' Unlawful Conduct Deprive
Plaintiffs of Right to Sell Premises

Thereafter, on or about February 21, 1972, plaintiffs entered into a contract to sell the premises to Alan Mandel and Judith Mandel. Previously, in a letter to the plaintiffs on September 1, 1971 (App. Ex. 8), LINDEN had threatened to prosecute subsequent vendees of the premises for use as a three-family dwelling, although such use was in compliance with the valid and lawful Certificate of Occupancy. When it became apparent that plaintiffs had been forced to put the premises up for sale, THE CITY and defendant, ARTHUR ZIMMERMAN (hereinafter referred to as "ZIMMERMAN"), successor to LINDEN and presently Commissioner of the Department, decided that threats were not sufficient and determined to further interfere with plaintiffs' rights. They maliciously and unlawfully sent a letter to the real estate agent who had brought about the aforesaid agreement, Phyllis Axelrod, falsely stating therein that the premises did not have a valid Certificate of Occupancy (App. Ex. 9), when actually defendants knew that a valid Certificate of Occupancy was in effect and was conclusive evidence of legality as against defendants. Finally, ZIMMERMAN arbitrarily and unlawfully refused, and continues to refuse, to issue plaintiffs a Certificate of Compliance to which they were and are entitled and for which they duly applied for in

accordance with the laws of THE CITY. Since no real property in Long Beach can be sold without a Certificate of Compliance, ZIMMERMAN thereby totally obstructed and continues to obstruct, any efforts by plaintiffs to convey the premises.

As a result of defendants' actions, the proposed purchasers, Judith Mandel and Alan Mandel cancelled the above mentioned contract to purchase the premises and refused and continue to refuse to take title to the premises; the previous lessees of the leased portions of the premises have refused to renew their leases, and no new tenants were available, and plaintiffs have been forced to abandon their home at the aforesaid premises and establish a domicile elsewhere.

Defendants' Unlawful Actions Resulted in Foreclosure of the Mortgage Held on Plaintiffs' Property

As a result of the foregoing actions of defendants, which prevented plaintiffs from leasing, selling and in any way conveying the premises, plaintiffs were unable to meet their mortgage payments, for the first time in March, 1972, and monthly thereafter. As a direct result of defendants' unlawful and improper conduct, plaintiffs are unable to meet their mortgage payments and were deprived of their right to lease, sell or otherwise convey their property. The foregoing conduct has resulted in the commencement of a suit against plaintiffs to foreclose the mortgage held on the premises.

Conclusion

Defendants' actions with regard to plaintiffs constitute a case history of harassment and illegal action by THE CITY and its officials. Starting with threats, persisting with their unlawful acts of purporting to revoke the Certificate of Occupancy for the premises, and culminating with their refusal to issue a Certificate of Compliance, defendants have succeeded in taking a home (and a means of producing a livelihood) from plaintiffs without just cause or due process of law. Instead, defendants' actions have left plaintiffs with a foreclosure proceeding clouding their property and a piece of paper that testifies to the fact that plaintiffs were once owners of property which they could inhabit and enjoy pursuant to the laws of THE CITY before those charged with upholding said laws chose, instead, to violate them.

POINT I

DEFENDANTS' RECALLING THE CERTIFICATE OF OCCUPANCY WITH NEITHER NOTICE NOR HEARING AND THEIR SUBSEQUENT UNLAWFUL REFUSAL TO ISSUE A CERTIFICATE OF COMPLIANCE FOR THE PREMISES CONSTITUTES A TAKING OF PLAINTIFFS' PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

In dismissing plaintiffs' suit in the court below, Judge Bruchhausen failed to address himself to plaintiffs' first two causes of action complaining of deprivation of property without due process of law and violations of the Fifth and Fourteenth Amendments. Chief Justice John Marshall in Marbury v. Madison, 5 U.S. 137, 2 L.Ed. 60 (1803) declared a basic premise of our system of government to be that:

> [t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.
>
> 5 U.S. at 163, 2 L.Ed. at 69.

That plaintiffs have suffered a legal injury at the hands of defendants appears plainly on the face of the complaint. All allegations of the complaint must be accepted as true on appeal from the granting of a motion to dismiss. Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1039 (1964).

The Fifth and Fourteenth Amendments of the Constitution were designed to protect the individual from invasion of his

rights by the federal and State governments. Schatte v. International Alliance, etc., 70 F.Supp. 1008, 1010 (S.D.Cal. 1947), aff'd, 165 F.2d 216 (9th Cir. 1948), cert. den. 334 U.S. 812, 68 S.Ct. 1018, 92 L.Ed. 1743 (1948). The due process clause of the Fourteenth Amendment demands all acts by a State through any of its agencies be in concert with basic tenets of liberty and justice. Shields v. Beto, 370 F.2d 1003, 1004 (5th Cir. 1967). In describing the due process clause in Boles v. Cox, 252 F.Supp. 173, 175 (E.D.Tenn. 1966) the court remarked specifically that

> [t]his Section of the Fourteenth Amendment was drawn to protect persons against unlawful and arbitrary deprivation of property by the State....

Absence of notice and a hearing before property can be taken from an individual by the State constitutes deprivation of property without the process of law. In a case in which a municipality terminated financial aid to certain welfare recipients without prior notice or a hearing, the Supreme Court ruled that the main ingredient of due process is the opportunity to be heard. Goldberg v. Kelly, 397 U.S. 254, 268, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287, 299 (1970). To the municipality's contention that an opportunity to be heard after a termination of the benefits would be sufficient, the court replied that unless irreparable harm would result to the community from any delay, as where drugs are mislabled or food is unfit for human consumption, the requirements of the due process clause are not met by anything but an opportunity

to be heard before the property is taken. In that case, therefore, a pre-termination hearing was required.

The case at bar presents this same situation. Defendants deprived plaintiffs of the Certificate of Occupancy to the premises and the rights and privileges it confers without notice or a hearing. Certainly no irreparable harm threatened the community by a continued use of the premises as a three-family house during the short time required for a hearing when the house had been used in that fashion for over 40 years before defendants suddenly and arbitrarily attempted to cut off that use. Therefore, this termination of benefits constitutes a taking of plaintiffs' property without due process of law within the meaning of Goldberg v. Kelly, supra.

The rule that a hearing is indispensable is deeply ingrained in our history and in the demands of justice. Joint Anti-Facist Refugee Com. v. McGrath, 341 U.S. 123, 161, 162, 71 S.Ct. 624, 643, 95 L.Ed. 817, 848 (1951), (Frankfurter, J., concurring). Courts have always been particularly careful to require that all elements of due process be met before a license can be revoked. In Wignall v. Fletcher, 303 N.Y. 435, 103 N.E.2d 728 (1952), the New York Court of Appeals reviewed a revocation of a drivers' license by the Commissioner of Motor Vehicles, stating as follows:

> A license to operate an automobile is of tremendous value to the indiv-

> idual and may not be taken away except by due process. If in the instant case it may be done loosely and informally and without regard to the statutes in such case made and provided, then it may be done in any case and every automobile driver in the State would be at the mercy of the commissioner and his assistants. However much we may recognize the need for the rightful exercise by the commissioner of his duties in his laudable effort to prevent unsafe driving on the highways, it would be a dangerous step indeed if we permitted him to follow any loose practice formulated by him, regardless of the law.
>
> 303 N.Y. at 441.

Under the Constitution an individual cannot be deprived of his property or have the value of that property impaired by the State without a prior hearing. That the value of plaintiffs' property has been drastically reduced by defendants' acts is indisputable. Deprived of a Certificate of Occupancy, plaintiffs have been forced to abandon their home and move elsewhere. Denied a Certificate of Compliance, plaintiffs cannot sell the property. Defendants' unlawful demand that plaintiffs transform their three-family residence that has been in use as such for almost half a century into a one-family residence before a Certificate of Compliance would issue would require that plaintiffs expend considerable sums of money to restructure the house and that they then would suffer a further loss in selling the house for a price far lower than that which the house would have commanded as a three-family residence. Plaintiffs

need allege no further taking of their property to state a cause of action under the Fifth and Fourteenth Amendments. This Court in Township of River Vale v. Town of Orangetown, 403 F.2d 684 (2nd Cir. 1968), where defendant, a town in New York, was rezoning an area contiguous to the plaintiff as an office and research complex, held that the complaint stated a cause of action for denial of due process.

> The Township allege[s] in its complaint that its property "has been and will be depreciated in value without due process of law" and that its constitutional rights had been violated. That allegation, although it could and should have been made more explicit, see, 2A Moore, Federal Practice, ¶ 8.09[1] (2d Ed. 1968), is adequate to invoke the due process clause of the fourteenth amendment. (Citation omitted).
>
> 403 F.2d at 685.

Certainly the allegations in plaintiffs' complaint are more than sufficient to state a cause of action by this standard.

The value of plaintiffs' property was dependent upon the premises' Certificate of Occupancy and thus its eligibility for a Certificate of Compliance. Without these documents which enabled plaintiffs to use, lease and sell the premises, plaintiffs' property was rendered useless. Defendants' recalling the Certificate of Occupancy coupled with their refusal to issue plaintiffs a Certificate of Compliance were done without resort to the procedures of notice and hearing as required by law. As the Supreme Court noted in

striking down an order not to serve or sell liquor to a woman who had been denied notice and a hearing before the order was effectuated:

> It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat.
>
> Wisconsin v. Constantineau, 400 U.S. 433, 436, 91 S.Ct. 507, 27 L.Ed. 515, 518 (1971).

If the Certificate of Occupancy to plaintiffs' property can be so unceremoniously revoked without notice or a hearing, any Certificate of Occupancy to any property can be revoked at the whim of an individual Commissioner; no one will be safe from being denied a Certificate of Compliance without cause, and property owners would thus be deprived of the right both to enjoy and convey one's own property. Such an idea is repugnant to a system of government by law:

> For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.
>
> Yick Wo v. Hopkins, 118 U.S. 356, 370 (1885).

The right to possess property, to be free to enjoy it and to convey it, and to be protected from government interference which will take or diminish the value of that property, without due process of law, are rights recognized in our Constitution to be essential.

It is of these rights that defendants have unlawfully deprived plaintiffs. Such a deprivation is directly violative of the Fifth and Fourteenth Amendments.

POINT II

DEFENDANTS' ACTIONS WITH RESPECT TO PLAINTIFFS IN VIOLATION OF THE LAWS OF THE STATE OF NEW YORK, CONSTITUTE A TAKING BY DEFENDANTS OF PLAINTIFFS' PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Although there are certain circumstances under which it is lawful to recall a Certificate of Occupancy using procedures prescribed by law, there is no legal manner by which a Certificate of Occupancy can be revoked or the rights and privileges it confers curtailed because of any condition which existed at the time of issuance while someone who has relied on that Certificate of Occupancy in purchasing real property remains in possession. The New York Multiple Residence Law applies to the case at bar since the premises is "[a] dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied by the temporary or permanent residence or home of three or more families living independently of each other...", within the definiton of a multiple dwelling pursuant to Section 4(33). Although the Multiple Residence Law took effect on July 1, 1952, it specifically includes dwellings constructed prior to that date, such as that in the instant case, pursuant to Section 302, referring to Certificates of Occupancy. This section further states:

> 5. A certificate, a record in the department, or a statement signed by

> the head of the department that a certificate has been issued, may be relied upon by every person who in good faith purchases a multiple dwelling or who in good faith lends money upon the security of a mortgage covering such a dwelling. Whenever any person has so relied upon such a certificate, no claim that such dwelling had not, prior to the issuance of such certificate, conformed in all respects to the provisions of the chapter shall be made against such person or his successor in title or ownership with respect to such multiple dwelling or mortgage, against the interest of any such person with respect thereto.

Plaintiffs' complaint in the case at bar, alleges that when they purchased the premises in 1969, the premises were being used openly as a three-family residence and had a valid Certificate of Occupancy for such use. Said Certificate of Occupancy had been issued in 1952 at which time the premises were also being used for three family dwelling. Relying upon this Certificate of Occupancy the plaintiffs decided to purchase the premises for occupancy by three families. Clearly, therefore, defendants' attempt to revoke plaintiffs' Certificate of Occupancy due to a non-conformity with the local zoning ordinance, which variation visibly existed at the time the certificate was issued, is a blatant violation of plaintiffs' right under the laws of the State of New York. In Sexstone v. City of Rochester, 32 A.D.2d 73, 301 N.Y.S.2d 887 (4th Dept. 1969), that court held that a city is under a duty to issue a Certificate of Occupancy in a careful

manner, in anticipation that a purchaser of realty will rely on such Certificate and, further, the City is liable if it negligently issues a Certificate of Occupancy for a building allegedly inhabited at that time in violation of the Multiple Residence Law:

> It should have been obvious to the city that in view of Multiple Residence Law, § 302(5) the certificate would be relied upon by one purchasing the property. Since there was a duty to issue the certificate in a careful manner with knowledge that the plaintiffs would rely thereon, the City should be liable for the neglient issuance, if such was the case. (Citations omitted). This act did not involve discretion, and the municipality is liable for its wrongful action in issuing it. (Citations omitted).
>
> 301 N.Y.S.2d at 888.

Plaintiffs purchased the premises in reliance on the Certificate of Occupancy issued to the premises 17 years before, wherein the building was designated as a legal three-family residence. Then in 1970, THE CITY, through its agent LINDEN, suddenly informed plaintiffs that the Certificate of Occupancy was being revoked, as the premises had been in violation of the zoning laws when said Certificate was issued. After 17 years of inaction, THE CITY revoked the Certificate of Occupancy for the premises, claiming that it had been issued "improperly and illegally." Plaintiffs merely relied on the Certificate of Occupancy duly issued by THE CITY. Yet they were made to suffer sudden

loss of their property in order to remedy the situation created as a result of THE CITY's own negligence and dereliction of duty.

That there was no individual or body authorized to revoke a Certificate of Occupancy so relied on has been established in New York by the Court of Appeals. In Edwards v. Murdock, 283 N.Y. 529, 29 N.E.2d 74 (1940), the Court held that a Certificate of Occupancy could not be revoked where the petitioner in acquiring his leasehold relied on a Certificate issued to his predecessor in interest:

> [i]t follows that the Board of Standards and Appeals had no authority to revoke as against the petitioner the certificate of occupancy issued to his predecessor in interest by the Commissioner of Buildings. The above stressed words of section 301 of the Multiple Dwelling Law [Language of said section identical to 302(5) of the Multiple Residence Law] are so explicit as to exclude any latitude of interpretation.
>
> 283 N.Y. at 533.

The prohibition against revoking a Certificate of Occupancy which has been relied upon by a purchaser is in accord with the legislative policy in New York with regard to all matters of public record. The rule in this State is that a city may not challenge the validity of any matter of public record once it has been relied upon by the public. Although generally a municipal corporation cannot be estopped by an unauthorized act of one of

its officials, an exception to this rule has been recognized where the unauthorized act results in a document's becoming a matter of public record. Rankin v. City of New York, 145 App.Div. 838, 130 N.Y.S. 427, 431 (1st Dept. 1911). See, also, Lang v. City of New York, 58 Misc.2d 566, 296 N.Y.S.2d 241 (Sup.Ct. Queens Co. 1968), aff'd 34 A.D.2d 1014, 314 N.Y.S.2d 139, (2nd Dept. 1970) mod. 28 N.Y.2d 601 (1971), which upheld the rule that a city can be estopped from asserting against the purchaser of realty the property taxes that had not been paid where the purchaser had relied upon a receipt issued by the City Collector showing that the taxes had been paid.

Once a Certificate of Occupancy has issued, it becomes a matter of public record upon which the public is entitled to rely. In the instant case plaintiffs relied upon the public record and deserve to be protected, rather than penalized by it. THE CITY must be estopped from denying the validity of its own records after inducing the plaintiffs to rely on the aforesaid Certificate of Occupancy to their detriment.

THE CITY and its agent LINDEN by their actions not only have violated plaintiffs' rights but Section 302(5) of the New York Residence Law as set forth supra. As the Court explained in Giaccio v. Pennsylvania, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966):

> Certainly one of the basic purposes of the Due Process Clause has always been

> to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land.
>
> 382 U.S. at 403, 86 S.Ct. at 521, 15 L.Ed.2d at 450.

Section 302(5) of the New York Residence Law clearly establishes that plaintiffs could rely on the Certificate of Occupancy and therefore the revocation of same by defendants was illegal and unlawful. There can be no doubt that defendants' depriving plaintiffs of the use of their own property, contrary to this law, constitutes a taking without due process of law in violation of the Fifth and Fourteenth Amendments.

POINT III

THE DOCTRINE OF LACHES BARS THE DEFENDANTS FROM ATTACKING THE CERTIFICATE IN QUESTION.

The municipality is estopped from attacking the validity of the Certificate of Occupancy as a result of THE CITY's laches. The original Certificate was issued on April 25, 1952, some 17 years prior to the defendants' unlawful attempt to revoke the Certificate. Such a delay in the enforcement of the alleged zoning ordinances constitutes laches, per se. In Re Klass, 158 N.Y.L.J. p. 20, col. 3 (Sup.Ct. Nassau Co. 1967), held that a Village should be estopped by a court of equity from raising objections to zoning ordinances as a result of the Village's failure to take action for a period of 24 years. The circumstances at bar are nearly identical to those presented in In Re Klass, and here, as well, plaintiffs must not be forced to suffer simply because they relied upon a matter of public record, namely, the duly issued Certificate of Occupancy. Justice demands that defendants be enjoined from attacking the validity of the Certificate of Occupancy as applied to the plaintiffs.

POINT IV

PLAINTIFFS' FIFTH CAUSE OF ACTION PROPERLY STATES A CAUSE OF ACTION AGAINST DEFENDANTS' ZIMMERMAN AND LINDEN PURSUANT TO 42 U.S.C., § 1983.

(a) INDIVIDUALS ARE SUBJECT TO SUIT IN THEIR OFFICIAL CAPACITIES UNDER § 1983.

Basing its decision on the holding of Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), that a municipal corporation is not a "person" within the meaning of 42 U.S.C. § 1983, the court below dismissed plaintiffs Fifth Cause of Action as to all defendants. [Decision of J. Bruchhausen, p. 4]. Although a municipal corporation is not within the purview of the statute, an individual official is a "person" for the purposes of § 1983. In City of Kenosha v. Bruno, 412 U.S. 507, 512, 95 S.Ct. 2222, 2226, 37 L.Ed.2d 109, 115 (1973), the Supreme Court definitively declared that a municipal corporation was immune from suit for both money damages and injunctive relief under § 1983. However, only municipal corporations, and no individuals, were named in the complaint, thus removing it from § 1983 jurisdiction.

Subsequent to the decision in City of Kenosha, supra, courts have been unanimous in holding that individual officials, unlike municipal corporations, are not immune from prosecution under § 1983. In Citizen's Committee for Faraday Wood v. Lindsay, 362 F.Supp. 651 (S.D.N.Y. 1973), the plaintiff sued The City of New York, the Mayor and the Administrator of H.D.A. in New York pursuant to § 1983. The court held that in light of Kenosha, supra, only claims against the two individual defendants could be entertained. Similarly, in Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973) the Court held that Baltimore must be dismissed from an action seeking declaratory and injunctive relief against racially discriminatory practice in the appointment and promotion of firemen relying on Kenosha. However, § 1983 jurisdiction was acquired over the individual officials who constituted the fire board and Civil Service Commission. The court in Commonwealth of Pennsylvania v. Glickman, 370 F.Supp. 724 (W.D.Pa. 1974), declared:

> Neither Kenosha nor Monroe preclude holding a municipal corporation liable under Sections 1983 or 1981 by means of an action against its employees. (Citation omitted).
>
> Id., at 728.

From the foregoing it is clear that although the municipality, itself, is not subject to suit, the court has jurisdiction

to enforce, as against the individual defendants herein, federally protected rights under § 1983.

(b) PROPERTY RIGHTS ARE ENFORCEABLE UNDER SECTION 1983.

The court below based its holding that § 1983 does not apply to property rights on the decision in the 1968 case of Bradford Audio Corporation v. Pious, 392 F.2d 67 (2nd Cir. 1968). [Decision of J. Bruchhausen, p. 5]. In that case the court held that no jurisdiction existed under § 1983 for plaintiff to vindicate seizure of $50,000 by a receiver under the color of a judge's order, allegedly in violation of due process as guaranteed under the Fourteenth Amendment. The foregoing case expressed the minority view point. C. Antieau, Federal Civil Rights Acts (1974), § 68, p. 48. Moreover, the decision in this case subsequently was overruled by the Supreme Court in 1972 in Lynch v. Household Finance Corporation, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), a case predicated upon § 1983. Lynch pertained to a garnishment pursuant to a Connecticut statute. The Court held that jurisdiction existed for plaintiff to pursue a claim for declaratory and injunctive relief of a property right under § 1983:

> ...the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People

> have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth a "personal" right, whether the "property" in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. (Citations omitted). Congress recognized these rights in 1871 when it enacted the predecessor of §§ 1983 and 1343(3). We do no more than reaffirm the judgment of Congress today.
>
> 405 U.S. at 552, 92 S.Ct. at 1122, 31 L.Ed.2d at 434-435.

The Supreme Court's recognition of the fundamental quality of the right to possess and transfer property is long standing. In Shelly v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1947), the Court declared this right to be a basic premise of our Constitution.

> It cannot be doubted that among the rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights were regarded by the framers of that Amendement as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.
>
> 334 U.S. at 10, 68 S.Ct. at 841, 92 at L.Ed. 1179.

Since 1972, courts have uniformly followed Lynch in identifying property rights as rights personal to an individual and enforceable under § 1983. In Simmons v. Wetherell, 472 F.2d 509 (2nd Cir. 1973), the Court held allegations that the state had taken property without paying just compensation or instituting court proceedings to state a cause of action under § 1983. Predicating its decision on Lynch's holding that property rights are basic civil rights, the Court in McClendon v. Rosetti, 460 F.2d 111 (2nd Cir. 1972), held a property clerk's disposing of property taken at the time of arrest without notice, pursuant to a New York City ordinance establishing a police property clerk, to state a cause of action under § 1983. A First Circuit case subsequent to Lynch involved a situation analogous to that in the instant case. In Gaffney v. Silk, 488 F.2d 1248 (1st Cir. 1973), the court, presented with certain town officials' discontinuing statutory benefits to plaintiffs without notice, reasons, or a hearing, held the officials' actions to be "a deprivation of federally protected rights within the meaning of § 1983," as set forth by the Supreme Court in Lynch. 488 F.2d at 1250.

It is with this same issue that the Court is faced in the case at bar. A Certificate of Occupancy having been issued to the premises, plaintiffs were entitled to certain benefits by

statute (Points I and II, infra), including the rights to inhabit, enjoy and transfer their property. Plaintiffs were denied these rights by the individual defendants who first purported to rescind plaintiffs' Certificate of Occupancy in a manner proscribed by law, thus denying plaintiffs their right to enjoy their property, and subsequently refused to issue plaintiffs a Certificate of Compliance as required by law, thus depriving plaintiffs of their right to alienate property. It is precisely these property rights that the Supreme Court granted protection under § 1983 in Lynch, and which were refused vindication under that statute by the court below.

(c) THE INDIVIDUAL DEFENDANTS, ACTING UNDER COLOR OF STATE LAW INFRINGED PLAINTIFFS' FEDERALLY PROTECTED RIGHTS.

The suggestion in the court below that there has been shown no connection with State and local officials in the misuse of State power [Decision of J. Bruchhausen below, p. 7] cannot withstand even the most cursory examination. The Supreme Court unequivocally established in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1885), that public authorities charged with administering municipal ordinances represent the State and, therefore, fall under the purview of the Fourteenth Amendment. The power possessed by these authorities by virtue of State law,

and the misuse of that power, "made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law". United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368, 1383 (1940).

That the official was acting contrary to state law does not prevent his acts from being under color of state law. In interpreting what constitutes an act under color of state law, the Supreme Court stated in Screws v. United States, 325 U.S. 91, 111, 65 S.Ct. 1031, 1040, 89 L.Ed. 1495, 1508 (1944):

> It is clear that under "color" of law means under "pretense" of law.... Acts of officers who undertake to perform their official duties were included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea.

It was to give individuals such as plaintiffs recourse against precisely the kind of abuses of power as were exercised by Commissioners LINDEN and ZIMMERMAN that Congress enacted § 1983. LINDEN was not and could not be authorized to use his office to deprive plaintiffs of their property without notice or a hearing. Yet because of his official position he succeeded in doing just that: he made it impossible for plaintiffs to inhabit or lease

the premises by using his position to revoke, by mail, plaintiffs' valid Certificate of Occupancy. These acts constitute a misuse of power under color of law in violation of § 302(5) of the Multiple Residence Law and the Fifth and Fourteenth Amendments. (Points I and II, infra.). ZIMMERMAN, in full knowledge of the fact that LINDEN's action of invalidating the Certificate of Occupancy was illegal, has refused and unlawfully continues to refuse to provide plaintiffs with forms for a Certificate of Compliance. Plaintiffs have a statutory right to a Certificate of Compliance as has any owner of property within THE CITY who has been issued a Certificate of Occupancy to which his property complies. Nevertheless, ZIMMERMAN denies plaintiffs a Certificate of Compliance, thus depriving plaintiffs of their constitutionally guaranteed right to convey real property. (Point I, supra). Since ZIMMERMAN is able to interfere with plaintiffs' rights only because of power derived from the State, his violation of plaintiffs' Fifth and Fourteenth Amendment rights is under color of state law.

(d) PLAINTIFFS ARE ENTITLED TO VINDICATE THEIR FEDERALLY PROTECTED RIGHTS IN A FEDERAL FORUM

Congress adopted § 1983 for the express purpose of providing a federal forum for persons those whose civil rights have been invaded by one acting under color of state law. The

statute seeks to provide "a federal remedy for the deprivation of federally guaranteed rights in order to enforce more perfectly federal limitations on unconstitutional state action." Jobson v. Henne, 355 F.2d 129, 133 (2nd Cir. 1966).

In the case at bar, plaintiffs have been subjected to unconstitutional state action. Plaintiffs' complaint describes a taking of their property by defendants LINDEN and ZIMMERMAN without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution. Section 1983 was designed purposely to offer those so unlawfully deprived of their Constitutional rights a federal forum in which to be recompensated again. Plaintiffs seek equitable relief and incidental damages. That plaintiffs may be able to obtain relief in the state courts similar to that available in the federal court does not defeat federal jurisdiction to grant relief. A suitor has the right to choose his forum. As Mr. Justice Harlan states in a concurring opinion in Monroe v. Pape, 365 U.S. 167, 196, 81 S.Ct. 473, 488, 5 L.Ed.2d 492, 510 (1962):

> A deprivation of a Constitutional right is significantly different from and more serious than a violation of a state right and therefore deserving of a different remedy even though the same acts may constitute both a state tort and a deprivation of a constitutional right.

(e) DEFENDANTS HAD KNOWLEDGE THAT THEIR ACTS WERE UNLAWFUL.

Since the word "wilful" is not included in § 1983, one acting under color of State law is liable under that section whenever the unconstitutional act for which suit is brought is the natural consequence of his actions. Monroe v. Pape, 365 U.S. at 187, 81 S.Ct. at 484, 5 L.Ed. at 505. There could be nothing more natural than that the unceremonious revoking of plaintiffs' Certificate of Occupancy and the refusal to issue a Certificate of Compliance to plaintiffs when the premises exactly complied with the duly issued Certificate of Occupancy, the revocation of which was blatantly invalid, this would result in, and indeed constitutes, a taking of property without due process of law.

Irrespective of the defendants' motivation for the performance of the complained of acts, defendants cannot now claim ignorance or misconception of the law. While there is no absolute presumption that everyone knows the law, "speaking broadly, we may say that all persons are treated as if they knew the law in passing on the character of their acts. In that qualified sense is knowledge of the law imputed to everyone." Municipal Metalic Bed Mfg. Corp. v. Dobbs, 253 N.Y. 313, 317 (1930).

As was said by Mr. Justice Rutledge, concurring in Screws v. United States, supra:

> Generally state officials know something of the individual's basic legal rights. If they do not, they should, for they assume that duty when they assume their office. Ignorance of the law is no excuse for men in general. It is less an excuse for men whose special duty is to apply it, and therefore know and observe it. If their knowledge is not comprehensive, state officials know or should know when they pass the limits of their authority, so far at any rate that their action exceeds honest error of judgment and amounts to abuse of their office and its function. When they enter such a domain in dealing with the citizen's rights, they should do so at their peril, whether that be created by state or federal law. For their sworn oath and their first duty are to uphold the Constitution, then only the law of the state which too is bound by the charter.
>
> 325 U.S. at 129-130, 89 L.Ed. at 1518 (1944).

Even under this standard, the honest error of judgment qualification has been limited so as not to prevent the condemnation of municipal action in contravention of civil rights, although such actions are ostensibly carried out under the guises of lawful regulations and/or exercises of the police power.

> When regulation becomes destruction, it ceases to be regulation.
>
> 8th Ave. Coach Corp. v. City of New York, 286 N.Y. 84, 94 (1941).

> The police power may not be invoked to sustain an unauthorized invasion of the citizen's rights and privileges.
>
> Bon-Aire Estates, Inc. v. Building Inspector of Town of Ramapo, 31 A.D.2d 502, 298 N.Y.S.2d 763, 769 (2nd Dept. 1969).

Whatever the motivation behind their acts, defendants LINDEN and ZIMMERMAN must be held to know the rights and privileges guaranteed by the Constitution of the United States and to be responsible for denying them to plaintiffs.

(f) PLAINTIFFS NEED NOT EXHAUST ADMINISTRATIVE REMEDIES BEFORE AN ACTION PURSUANT TO 42 U.S.C. SECTION 1983 WILL LIE.

No need exists to first exhaust state administrative remedies prior to the institution of an action commenced in federal court based on § 1983. McKneese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); Damico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967). See, also, King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968).

For the foregoing reasons, plaintiffs' Fifth Cause of Action against the individual defendants, ZIMMERMAN and LINDEN under 42 U.S.C. § 1983 should not be dismissed.

POINT V

PARAGRAPH 41 OF DEFENDANTS' ANSWER SHOULD BE STRICKEN, AS SECTION 50-e OF THE GENERAL MUNICIPAL LAW OF NEW YORK DOES NOT APPLY TO ACTIONS IN EQUITY OR INVOLVING INJURIES OF A CONTINUING NATURE.

Paragraph 41 of defendants' answer alleging that plaintiffs have not complied with Section 50-e of the General Municipal Law is irrelevant to the action herein and should be stricken. That provision has no application to suits in equity, or to those involving injuries of a continuing nature.

> Section 50-e. Notice of Claim.
>
> 1. In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general corporation law, or any officer, appointee or employee thereof, the notice shall comply with the provisions of this section and it shall be given within ninety (90) days after the claim arises.
>
> 23 McKinney's Consolidated Laws, General Municipal Law, § 50-e.

The Court of Appeals has established the principal that where the demand for money damages is subordinate to a main prayer for equitable relief, and incidental to the preventive relief which is prayed for, and where acts of a continuing nature are involved, equity will take jurisdiction of the action, and

claims for damages will not be barred by a statute of limitations shorter than the equity statute.

In Sammons v. City of Gloversville, 175 N.Y. 348 (1903), the Court of Appeals construed a notice provision similar to that of GML § 50-e. There the Court said:

> The short statute of limitations could not have been intended to bar actions for equitable relief against acts constituting invasions of property rights and of a continuing, and damaging, nature. While this action comprehended a recovery of the damages already sustained, its demand was for equitable relief. That is its main object...and the damages are, purely, incidental to the preventive relief, which is prayed for. A court of equity will take cognizance of an action based upon continued and continuing invasions of property rights and gaining jurisdiction, upon the established facts of the case, to restrain their future continuance, and thus to prevent a multiplicity of suits, in successive actions for the injuries, award, as incidental to its decree, such damages that have occurred within the six years. Acquiring jurisdiction for one purpose, it will retain it for all purposes and adjust, as between the litigants, all matters involved in their dispute. Therefore, we hold that, upon the correct interpretation of the statute, it has no application to a suit on the equity side of the court for relief from wrongful acts in the nature of trespass; which, day by day, cause injury and damage to the com-

> plainant; although there is involved a demand for the damages in the past.
>
> 175 N.Y. at 351.

The opinion expressed in Sammons has continued to control in New York. In Meinken v. County of Nassau, N.O.R., 178 N.Y.S.2d 529 (Sup.Ct. Nassau Co. 1958), Justice Hill wrote:

> The seeming inconsistency of the cases cited on both sides of this question is more illusory than real. Actually they agree on the proposition that unless the statute is so broad in its terms as to necessarily cover all types of claims, whether incidental to an equitable action for an injunction or not, then it shall not be construed so as to enlarge its application beyond its ordinary meaning.... I do not think that the incidental character of the money damages is to be determined by the amount demanded so much as by the fact that it is truly ancillary to an injunction suit; i.e., you have a continuing wrong presenting a genuine case for the exercise of the equitable powers of the court. (Citations omitted).
>
> 178 N.Y.S.2d at 530.

In the case at bar, a situation is presented whereby any claim for damages is subordinate to the main prayer for equitable relief, to wit, the granting of an injunction to prevent defendants from attacking the validity of plaintiffs' Certificate of Occupancy. Furthermore, defendants have caused plaintiffs injuries of a continuing nature, by interfering and preventing

plaintiffs from contracting, leasing, selling, devising or otherwise conveying the subject premises in Long Beach. Indisputably, then, the instant suit comes within the standards set forth by the Court of Appeals for actions over which equity has jurisdiction, thereby rendering GML Section 50-e inapplicable.

As plaintiffs are suffering continuing injury from defendants' illegal actions in revoking the Certificate of Occupancy, and as any claims for damages are subordinate to the main prayer for injunctive relief, equity has jurisdiction. GML § 50-e, applying only to actions sounding in tort, is therefore clearly inapplicable.

Paragraph 41 of defendants' answer alleging plaintiffs' non compliance with GML § 50-e must therefore be stricken as irrelevant.

CONCLUSION

The order of Justice Bruchhausen dismissing all seven (7) causes of action in plaintiffs' complaint must be reversed in all respects, and the complaint reinstated.

Respectfully submitted,

ZANE and ZANE,
Attorneys for Plaintiffs,
One Rockefeller Plaza,
New York 10020.

(212) 245-2222

James B. Zane,
Martin E. Fiel,

Of Counsel.

APPENDIX

EXHIBIT "1"

DEPARTMENT OF BUILDINGS
CITY OF LONG BEACH, NEW YORK

CERTIFICATE OF OCCUPANCY

ISSUED April 25th 1952 TO Beatrice V. Anderson

PREMISES 425 W. Olive St. (ADDRESS) (SEC.) 36 (BLOCK) (LOTS)

in accordance with Chapter 10 of the Building Code of the City of Long Beach.

THIS CERTIFIES that the ALTERED / NEW BUILDING situated on the above mentioned premises has been completed and conforms substantially to the approved plans and specifications on file in my office and to the requirements of Chapter 10 of the Building Code and permission is hereby granted for its occupancy for the purpose specified below:

TYPE BUILDING	ZONE	USE	VARIANCE	— OTHER DETAIL
Apartment	Use "B"	Three Family		Stucco
1st Flr - Three rooms & Bath				
2nd Flr - Four rooms & Bath				
3rd Flr - Four rooms & Bath				

FLOORS

Certificate No. "A" 811

Building Permit No. Existing 194....

P. J. G. [illegible]
Building Commissioner of Long Beach

EXHIBIT "2"

November [illegible]

Mr. Mrs.L.&.L.Walsch
[illegible].Olive St.
Long Beach,N.Y.

Dear Sir & Madam:

Re: [illegible].Olive St.
Long Beach,N.Y.

Sec.59-[illegible].36-L.63/6[illegible]

Inspection of the above premises reveals the following violation:

There are three family units in a building zoned for one family occupancy only.

You are hereby directed to take the necessary steps to correct this violation within ten (10) days or legal action will be instituted.

Kindly notify this office of action taken.

Very truly yours,

Eli Katz
Building Commissioner
City of Long Beach,N.Y.

EK:r
Cert.rrr

23

EXHIBIT "3"

THE CITY OF LONG BEACH NEW YORK

CITY HALL, 11561 (516) 431-1000

December 24, 1970

Mr. & Mrs. Lawrence Walsh
425 West Olive Street
Long Beach, New York

Re: 425 West Olive Street
Sec. 59 Block 36 Lot 63 & 64

Dear Mr. & Mrs. Walsh,

In examination of the official files of the Building Department of Long Beach, covering premises 425 West Olive Street, Long Beach, New York indicating that your building was erected on or about September 1, 1927 as a one family house; Certificate of Occupancy #507 was issued to Mr. Rowland V. Smith on September 21, 1927.

Thereafter a Certificate of Occupancy #A-811 was issued on April 25, 1952 by the then Building Commissioner of Long Beach permitting the building to be used as a three family dwelling.

I am informed by the Corporation Councilor's office that the latter Certificate of Occupancy dated April 25, 1952 was issued improperly and illegally and contrary to the zoning ordinance in existance at that time.

I must advise you that you are presently using the said premises as a three family house in a Residence (B) Zone which permits only the use as a one family house.

This will serve to advise you that as Building Commissioner and Director of Property Conservation, I hereby revoke and recall the said C.O. #A-811 issued on April 25, 1952.

Inspection of the property will be made on or about January 15, 1971 to ascertain the use of said property.

Very truly yours,

David Linden
Building & Conservation
Commissioner

DL:ff
Copy: City Manager
Corporation Councilor

EXHIBIT "4"

April 9th, 1952

David Robinson
56 Bay Street
St George, S.I., N.Y.

Re: 425 W. Olive St.
Sec. 2, Bl. 36, Lots 63-64

Dear Sir:

Your letter of April 7th, 1952 re 425 W. Olive Street, Sec. 2, block 36, Lots 63-64 received. An inspection of the above premises made April 9th, 1952 reveals the following:

1st Floor - 1 five room apartment
2nd Floor - 1 five room apartment
3rd Floor - 1 four room apartment

Certificate of Occupancy #507 issued on September 21st, 1927 to Rowland V. Smith was for one family residence. The above peoperty is located in Residence "A" zone which is a one (1) family area.

Yours truly
CITY OF LONG BEACH

By:
Building Commissioner

PJD/cc

EXHIBIT "5"

Inter - Office Memo

April 25th, 1952

From: Corporation Counsel B.M. Bailey

To: Building Commissioner P.J. DeVine

Re: Certificate of Occupancy
Sec. 2, Bl. 36, Lots 63-64
425 W. Olive St.

Plans filed April 26th, 1926 in the Building Department indicate a one family house. Certificate of Occupancy issued September 21st, 1927 by Building Commissioner at time, one Edward A. Stimpson, indicates a one family house, On the same day inspection report signed by same Edward A. Stimpson indicates a three family house consisting of one six, one five and one four room apartments. Water record throughout the years to date indicate same physical condition.

Under the circumstances it is my opinion that at this date 25 years after construction of house and after such use as a three family house, nothing should be done to disturb use as a three family house so long as this house shall remain in existence.

Bearing in mind that we should always concern ourselves with what is expedient for the public, it is my opinion that a correct Certificate of Occupancy namely one for a three family house should be issued to replace Certificate of Occupancy issued September 21st, 1927 which was manifestly incorrect in describing building as a one family residence.

By: B.M. Bailey
Corporation Counsel

BMB/cc

EXHIBIT "6"

June 11, 1963

Mr. & Mrs. Joseph and Hannah Kotkin
[illegible] Olive St.
Long Beach, N.Y.

Dear Sir & Madam:

Re: [illegible] Olive St.
Long Beach, N.Y.

Sec. 59-Blk. 36-Lots 63/64

Kindly call this office at your earliest convenience, for the purpose of making an appointment with me, regarding the above premises.

Very truly yours,

[illegible]
Building Commissioner

Gc.1-1000

DL:r

6/13/63

Mrs. Kotkin was in this office today. We were advised that this property is zoned for one family

-46-

EXHIBIT "7"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- x

LAURENCE WALSH and LORETTA WALSH,

Plaintiffs,

-against-

THE CITY OF LONG BEACH, ARTHUR ZIMMERMAN, DAVID LINDEN, AL SMITH and GEORGE TRIPANI,

Defendants.

- x

EXAMINATION BEFORE TRIAL of DAVID LINDEN, taken by the Plaintiffs pursuant to Notice and adjournment by agreement, held at the office of the Corporation Counsel of the City of Long Beach, 1 Westchester Street, City Hall, Long Beach, New York 11561, on February 22, 1973 at 10:00 A.M., before a Notary Public of the State of New York.

PROFESSIONAL REPORTING SERVICE
132 NASSAU STREET
NEW YORK, N. Y. 10038
227-0033

A Probably.

Q Could you tell us where the dates were set and what it was?

A No, I couldn't tell you that.

Q Could you tell us whether in fact a re-examination was conducted with the department?

A I'm pretty sure it was.

Q Could you tell us when in fact such an examination was made while Mr. Kolkin was owner of the premises?

A I couldn't remember that, either.

Q Is that that you cannot recall if there was any entry, or that you cannot recall if there were any entries made?

A We might have a record of when we were going to make the inspection, I don't know.

Q According to the record files now, you have no record of a re-examination to Mr. Kolkin?

A I don't see one.

Q Do you recall having any conversation regarding that matter?

A I'm thinking about that.

Q Who caused the re-examination, was it the Corporation Counsel?

A I told him about it.

Q Was it ever reduced into writing?

A There is no record in the file. No, I don't see any.

Q Was there any discussion concerning its validity or invalidity of the Certification of Occupancy Number A-811 on these premises?

A No.

Q Had you examined the Certificate of Occupancy at the time that Kolkin came in to see you?

A Yes.

Q And there was no discussion regarding the Certificate of Occupancy?

A No.

Q Did you at the time that you had this discussion with Mr. Kolkin, or accordingly before then, or subsequently, did you discuss the matter of occupancy with the Corporation Counsel of the City of Long Beach?

A I believe I did.

Q I now refer to the time when Mr. Kolkin was the owner of the premises?

A I don't think so.

Q At the time you examined the Certificate of Occupancy, was it prior to the meeting with Mr. Kolkin?

A I believe so.

Q Did you question its validity?

MR. WEINBLATT: Off the record.

(Discussion off the record.)

A No. There was no discussion.

Q Now, approximately, after the meeting with Mr. Kolkin in June of 1968, do you recall having any discussion with the Corporation Counsel regarding the validity of the Certificate of Occupancy, and I am now referring to the time when Mr. Kolkin was still the owner of the premises?

A No. I don't recall.

Q The record file shows what appears to be a Certificate of Occupancy, or abstract of the record and conveyance of the property from Mr. Kolkin to Mr. Walsh in the month of April of 1969.

Do you recall when this document came to the files of the department?

A I don't know.

MR. ZANE: Off the record.

(Discussion off the record.)

Q Mr. Linden, during the time of your tenure and during the period that Mr. Kolkin was the owner of the premises, did any official of the City of Long

EXHIBIT "8"

September 1, 1971

Mr & Mrs Lawrence Walsh
425 West Olive St.
Long Beach, N.Y.

Re: 425 W. Olive St.
Long Beach, N.Y.
Sec. 59, Bl. 36, Lots 63-64

Dear Mr & Mrs Walsh:

It has come to my attention that the above premises is for sale.

Referring to my letter of December 24, 1970, please be advised that although the undersigned took no action against you for violation of the Zoning laws, by reason of your reliance in acquiring property on a certificate of occupancy issued in 1952 which I believe was improper, this will advise you that any transferee hereafter who uses property in violation of Zoning Laws will be prosecuted unless there is compliance.

Very truly yours

David Linden, Commissioner of
Bldg. & Prop. Conservation

DL/c

cc: Station Realty Co.
27 W. Park Ave.
Long Beach, N.Y.

CITY OF LONG BEACH

LONG BEACH, N. Y.

(516) 431-1000

June 22,1972

Station Realty Co.
Att.Mrs.Phyllis Axelrod
27 West Park Avenue
Long Beach, N.Y.

Re: 425 West Olive Street
Sec.59-Bl.36-L.63/64

Dear Mrs.Axelrod:

Your letter of June 14,1972 requested a Certificate of Compliance for the above premises and enclosed a copy of Certificate of Occupancy, No.A-811, dated April 25,1952 for the same dwelling.

This Department has determined that the aforementioned Certificate of Occupancy for three (3) families was issued improperly and illegally, and contrary to the Zoning laws existing at that time. In his letter to the owner, dated December 24, 1970 the then Building Commissioner revoked and recalled the illegal Certificate of Occupancy.

We experienced considerable difficulty in gaining entry to the premises and finally had to resort to acquisition of a search warrant on April 27, 1972, in order to make an inspection.

On the basis of our inspection we notified the owners on May 12,1972 that the premises were in violation of the Zoning laws. Todate, no effort has been made to reduce the number of units in the building, and no application for a variance has been made to the Zoning Board of Appeals. In fact, the owners recently vacated their unit, moved out of state, and immediately rented the unit to a third tenant, thus maintaining the status quo.

Under the circumstances and until such time as the matter regarding the illegal Certificate of Occupancy is resolved, by the owners or the Court, and the Zoning violation corrected, no action will be taken by this Department towards issuance of a Certificate of Compliance.

Very truly yours,

Arthur Zimmerman, Commissioner
Dept.of Bldgs.& Property Cons.

AZ:r
Encl.check#1217-dated 6/14/72

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 74-2069

LAWRENCE WALSH and LORETTA WALSH

Plaintiffs-Appellants

v.

THE CITY OF LONG BEACH, ARTHUR ZIMMERMAN, DAVID LINDEN, AL SMITH and GEORGE TRIPANI

Defendants-Appellees

AFFIDAVIT OF SERVICE BY MAIL

David Candelaria, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 227 St Anns Ave Bronx, N.Y.

That on the 14th day of November, 1974, deponent served the within Brief for Plaintiffs-Appellants upon Corporation Council City of Long Beach Long Beach, N.Y.

Attorney(s) for the Appellees in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

David Candelaria

Sworn to before me,

This 14th day of November 1974

William A. McKaigney

WILLIAM A. McKAIGNEY
Notary Public, State of New York
No. 41-7846700
Qualified in Queens County
Certificate filed in Kings County
Commission Expires March 30, 1976